

84-731

NO.

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OCT 15 1984

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

JOSEPH B. SHUMATE, JR., PETITIONER

v.

JAMES F. DOUTHAT, SUBSTITUTE TRUSTEE, ET AL

ON WRIT OF CERTIORARI FROM THE
UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

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5.188



QUESTIONS

- I. Did the District Court have jurisdiction to hear this case after entering an order May 19, 1983, abandoning the real estate and property which is the subject of this suit and allowing the creditor to realize on its security interest?
- II. Did the District Court err in ruling that the substitute trustee under a deed of trust did not have a conflict when said trustee was an attorney for note holder-creditor NCNB Financial Services and represented them in litigation which involved the amount due under the deed of trust?
- III. Did the District Court err by holding that a valid sale was created between NCNB Financial Services and Pulaski Furniture despite their lack of agreement as to the disposal of the fixtures at the July 15th auction?

LIST OF PARTIES

IN RE:

COLEMAN FURNITURE CORPORATION,

DEBTOR

JOSEPH B. SHUMATE, JR.,

PLAINTIFF-APPELLANT

VS.

JAMES F. DOUTHAT,

SUBSTITUTE TRUSTEE DEFENDANT-APPELLEE

PULASKI FURNITURE CORPORATION

DEFENDANT-APPELLEE

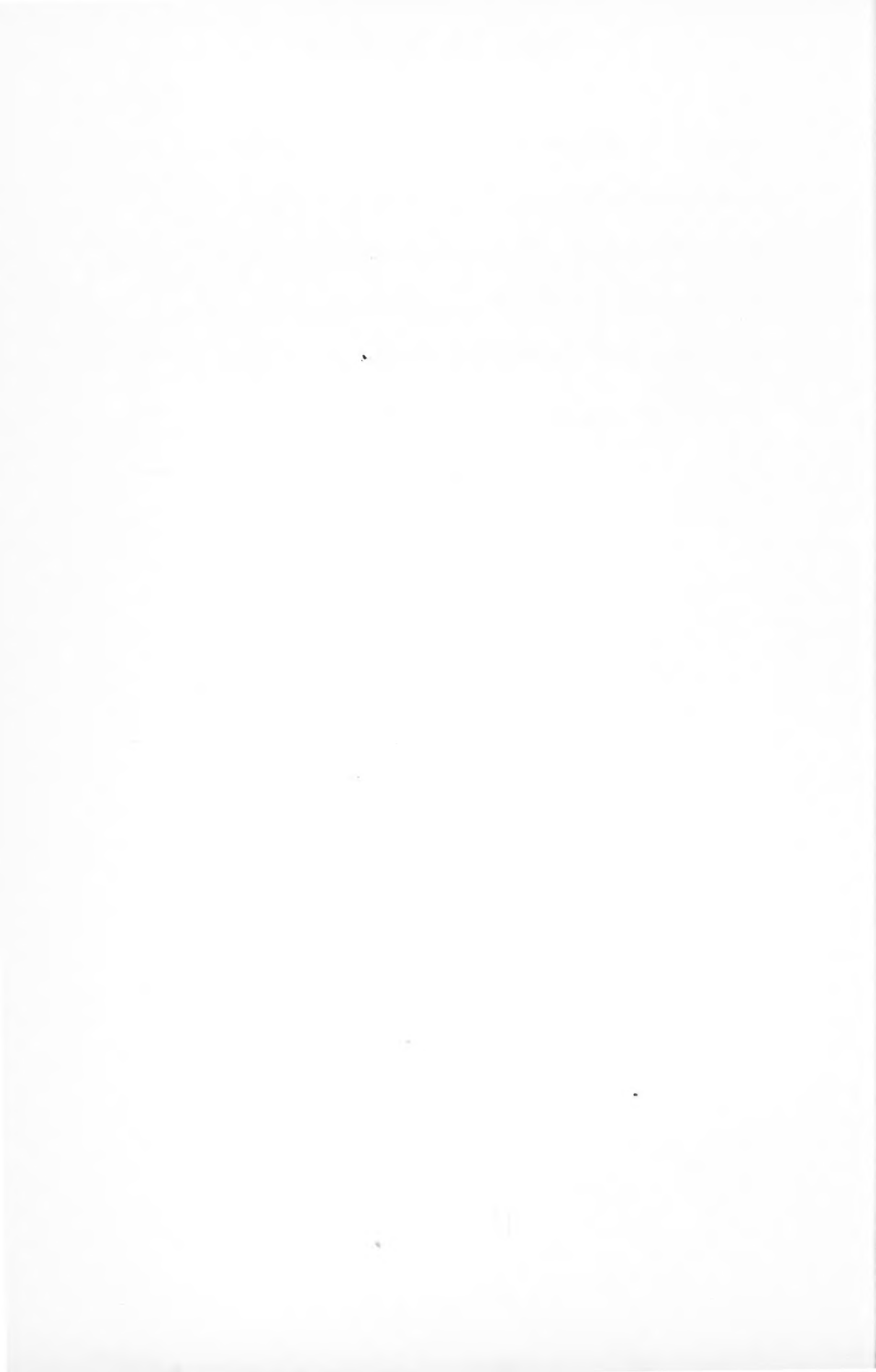
NCNB FINANCIAL SERVICES

DEFENDANT-APPELLEE

Donald E. Earls, Gregory M. Stewart, John C. Quigley, Jr., and Max Jenkins (Jenkins & Quigley on brief) for Appellant; Benjamin C. Ackerly (T. Justin Moore, III, and Hunton & Williams on brief) for Appellee Furniture Corporation; Thomas A. Leggette (William B. Poff, Daniel F. Layman and Woods, Rogers, Muse, Walker and Thornton on brief) for Appellee. James F. Douthat; Stephen M. Hodges (Penn, Stuart, Eskridge & Jones; George V. Hanna, III; Hayden J. Silver, III; More, Van Allen & Allen on brief) for Appellee NCNB Financial Services, Inc.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

NO. _____

JOSEPH B. SHUMATE, JR., PETITIONER

V

JAMES F. DOUTHAT, SUBSTITUTE TRUSTEE, ET AL

PETITION FOR A WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND
ASSOCIATE JUSTICES OF THE SUPREME COURT
OF THE UNITED STATES:

Joseph B. Shumate, Jr., the
Petitioner herein, prays that a writ of
certiorari issue to review the judgment of
the United States Court of Appeals for the
Fourth Circuit entered in the above
entitled case on July 23, 1984.

OPINIONS BELOW

The opinion of United States Court of
Appeals for the Fourth Circuit
(unpublished) is printed in Appendix A
hereto, page ____.

JURISDICTION

The Judgment of the United States Court of Appeals for the Fourth Circuit was entered on July 23, 1984. The Jurisdiction of the Supreme Court is invoked under 28 USCS § 1251 to 1257.



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STATEMENT OF THE CASE

On November 3, 1982, Coleman Furniture Corporation ("Coleman") filed a Chapter 11 Bankruptcy petition. The debtor remained in possession. Thereafter, the debtor was found to have violated a court order in respect to the use of cash in the operation of Coleman.

Shortly thereafter, on February 18, 1983, a trustee in bankruptcy was appointed and directed to take possession of all property of the debtor.

The trustee in bankruptcy made attempts to sell the property as a going concern but these attempts which included an offer of \$3,550,000.00 from DMI Furniture, Incorporated, failed.

After the failure of the trustee in bankruptcy to sell this business, the trustee in bankruptcy abandoned this property. The court found that continuation of this business was not feasible and



on May 19, 1983, the "Order of Abandonment" was entered. In part it states:

"Accordingly, it is hereby ADJUDGED and ORDERED that:

1. All of the assets of the debtor, excluding choses in action, the debtor's pension fund and certain monies to be held by the trustee as hereinafter described, as abandoned from the debtor's estate to Financial Services and the stay in effect pursuant to 11 USC § 362 is modified as to Financial Services to allow Financial Services to take possession of all assets abandoned herein and to realize on its security interest in said assets ...

8. This proceeding is continued on the docket of this court for a report concerning any sale of the assets of Coleman, any administrative expenses incurred in this proceeding, the report of Raymond R. Robrecht of the acceptance or rejection of the offer of Financial Services to the unsecured creditors, and the report of Financial Services of the application of monies paid to and on the outstanding indebtedness secured by said assets, together with such other matters as may be probable before the court..."



The Appellant, Joseph B. Shumate, Jr., is a major stockholder in Coleman and is a guarantor on a loan to NCNB Financial Services. The Appellant in the bankruptcy proceeding, and prior to the events that will be described hereinafter, had instituted a suit against NCNB Financial Services in which he alleged that an excessive rate of interest had been charged Coleman by NCNB Financial Services. This suit is presently pending in the United States District Court for the Western District of Virginia. If the Appellant is correct in this suit, it would reduce and otherwise effect the amount due to NCNB Financial Services.

On May 23, 1983, NCNB Financial Services executed an instrument appointing James Douthat and Thomas Palmer as Substitute Trustees under a deed of trust by and between Coleman and John B. Spiers, Jr. and Duane E. Mink. Mr. Douthat, who would



ultimately act as the sole trustee under the deed of trust, was the attorney of record for NCNB Financial Services in the interest suit filed by Shumate. Mr. Douthat continued in his capacity representing NCNB Financial Services in the interest rate suit.

On June 7, 1983, Mr. Douthat, acting in his capacity as trustee under the deed of trust, delivered letters to the Appellant, Coleman, and the trustee in bankruptcy declaring the unpaid balance payable forthwith and advising of foreclosure as not paid.

Mr. Douthat, again acting in his capacity as trustee under the deed of trust, on June 24, 1983, advised that there would be a separate public auction of the equipment and remaining inventory of Coleman.



The Appellant, Shumate, assuming that the United States District Court had no jurisdiction because of the abandonment by the trustee in bankruptcy, on July 12, 1983, brought an action in the Circuit Court of Pulaski County to enjoin Appellee Mr. Douthat in his capacity as trustee from selling certain real estate. The Circuit Court Judge of Pulaski County as a hearing ruled that he did not have jurisdiction. (This argument was advanced by Mr. Douthat who, at that time, was representing himself as trustee and Appellee NCNB Financial Services in the injunction proceeding.) The injunction suit was dismissed and later a similar injunction was dismissed in the United States District Court by the Honorable James Turk.

The deed of trust to be foreclosed by Mr. Douthat had been executed by Appellant and Coleman on December 28, 1977, granted



certain real estate to the trustee, and in addition thereto:

"with all fixtures, equipment and rights attached or appurtenant to the Property, including, without limitation, all water and sewer contract rights, mineral rights, gas rights, water and water rights, all electric lighting fixtures heaters, furnaces, incinerators, stokers, gas or oil burners, heating controls, motors, fans, tanks, fixtures, heating, cooling, plumbing, gas, electric and air conditioning fixtures, machinery and equipment and other equipment of every nature and kind...."

The advertisements which were run in the newspapers by Mr. Douthat, trustee under the deed of trust, stated as follows:

"Pursuant to the terms of a certain deed of trust dated December 28, 1977 ... etc., executed by Coleman Furniture Corporation ... etc., the undersigned substitute trustee, duly appointed as substitute trustee ... etc., will on the 15th day of July, 1983, at 12 Noon ... sell at public auction the following described real estate."



On July 15, 1983, the foreclosure sale under the deed of trust took place at the steps of the courthouse. The property was not sold as advertised. Apparently Mr. Douthat, the trustee under the deed of trust, intended to exclude all personal property, including fixtures.

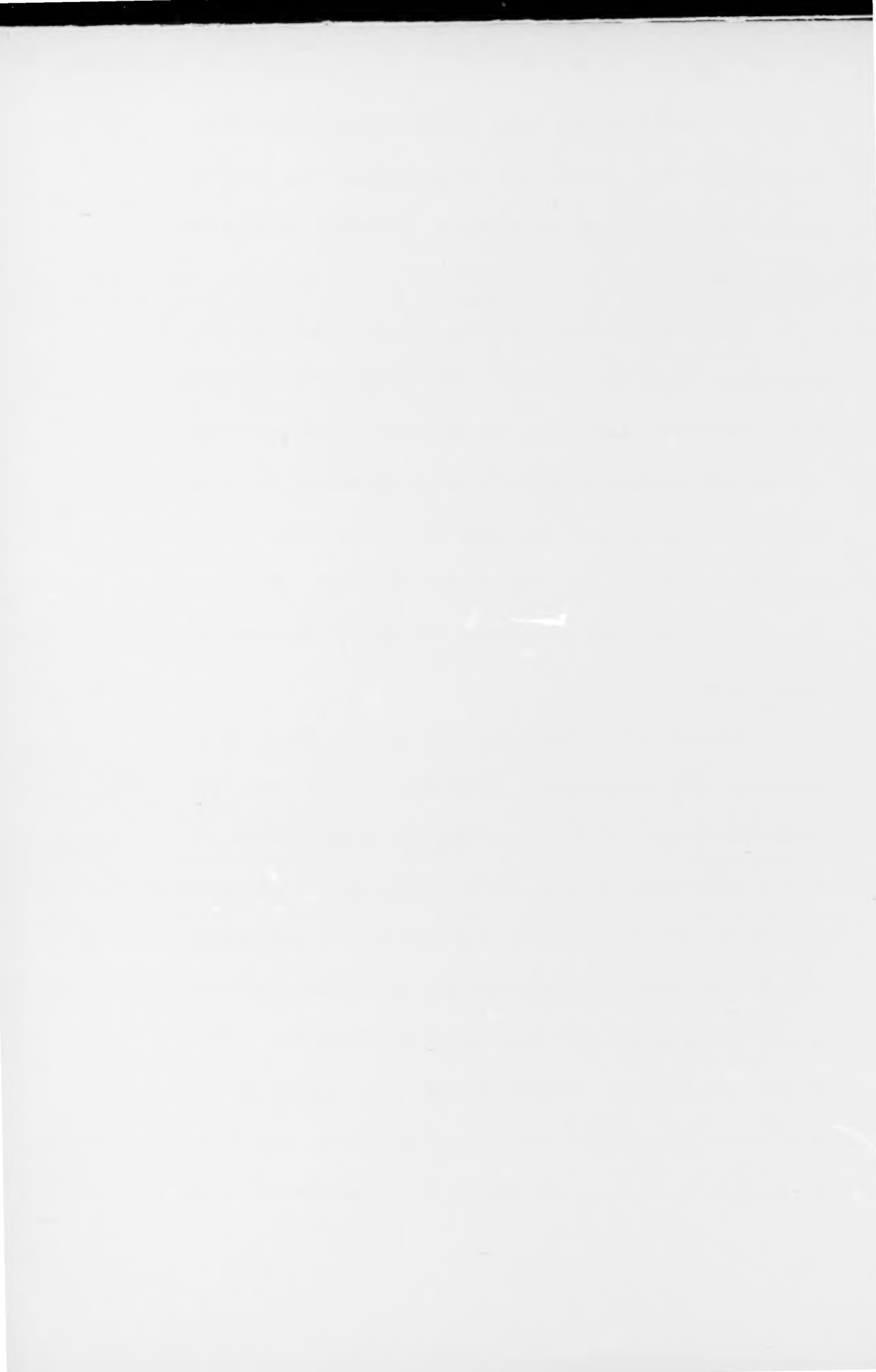
Appellee Douthat began the auction by announcing that equipment and machinery would be sold separately in August. He advised those in attendance, which included the Appellant, Shumate, that the appraisal he had with him would serve as the basis for determining whether an item was personal or real property. He asked if anyone had questions, but no one responded. Additionally, he also indicated that if there was a question in anyone's mind as to whether a particular item was included, then the item should be presumed to be personal property.



According to the Appellant Shumate, Appellee Mr. Douthat announced he would only be selling the real estate and the four walls.

Among those attending the sale, besides the Appellant Mr. Shumate, were T.G. Wampler and Ira Crawford, representatives of Pulaski Furniture Corporation, who were interested in purchasing the real estate. Also in attendance was Marvin Barman, who was an agent of NCNB Financial Services.

After attempting to sell the real estate in separate tracts (part of the real estate was located in the Town of Pulaski, part of the real estate was located in the Town of Dublin), Douthat sold the entire tracts to Pulaski Furniture Corporation for \$2,000,000.00. The high bid was submitted on behalf of Pulaski Furniture Corporation by T.G. Wampler and Ira Crawford, agents of the



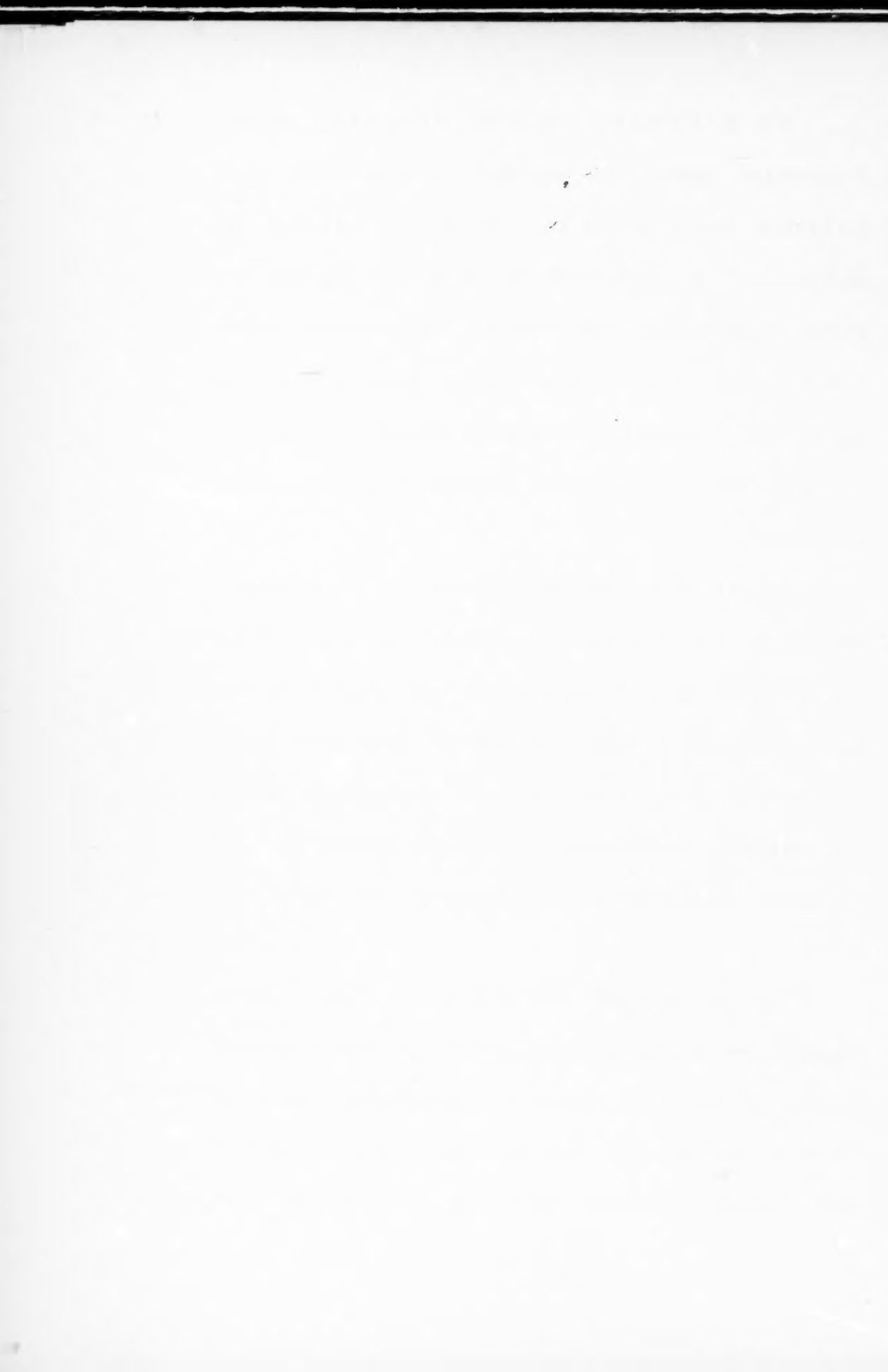
said Furniture Company. Unknown to your Appellants, subsequent to the foreclosure sale, a dispute arose between NCNB Financial Services and Pulaski Furniture Corporation whether certain items of personal property, which were affixed to the building, were in fact sold as part of the foreclosure sale of the real property. Your Appellants did not learn of the above stated facts until March 1, 1984, when your Appellants took the depositions of Marvin Barman, T.G. Wampler and Ira Crawford and the understanding was of your Appellant from the depositions of the above mentioned persons that there was no "meeting of the minds" between NCNB Financial Services and Pulaski Furniture Corporation as to what was actually sold or purchased. These depositions were filed in this case and used by both parties in trial briefs and memorandums.



As a result of the dispute, NCNB Financial Services agreed to purchase and Pulaski Furniture Corporation agreed to sell its \$2,000,000.00 bid to Appellee NCNB Financial Services. Appellee NCNB Financial Services then returned to Appellee Pulaski Furniture Corporation its \$2,000,000.00 earnest money deposit plus interest.

Appellant, after taking of the depositions on March 5, 1984, amended his complaint which included the above facts and alleged a rescission of the contract of sale which occurred between NCNB Financial Services, Trustee Douthat and Pulaski Furniture Corporation on July 15, 1983.

On or about August 15, 1983, your Appellant filed a complaint in the Circuit Court of Pulaski County, Virginia, seeking to set aside the foreclosure sale fairly and impartially and as a result the



property was sold for a grossly inadequate price which was subsequently amended two times. (Again, the Appellant assumed jurisdiction would be in a state court due to the order of abandonment.) In connection with the said complaint, your Appellant filed a Memorandum of Lis Pendens.

On November 8, 1983, the suit filed by your Appellant in the Pulaski County Circuit Court was transferred by agreed order to the United States District Court for the Western District of Virginia. Also, on November 8, 1983, NCNB Financial Services assigned the \$2,000,000.00 bid back to Pulaski Furniture Corporation in whom title currently vests.

On December 29, 1983, the Honorable Judge Turk ordered that 11 issues involving or affecting Pulaski Furniture Corporation shall be, and hereby are,



transferred to the Honorable Glen M. Williams for "whatever proceedings and disposition as may be appropriate."

The trial on the issues was convened on April 5, 1984, in the aforesaid Court with the Honorable Glen M. Williams, Judge, presiding with an advisory jury. The Defendant-Appellees, Pulaski Furniture Corporation, Douthat and NCNB Financial Services, filed a motion in limine to prohibit the plaintiff from using testimony obtained through depositions concerning Marvin Barman's testimony, Ira Crawford's testimony, B.C. Wampler's testimony, and T.G. Wampler's testimony that there was no meeting of the minds between NCNB Financial Services and Pulaski Furniture Corporation, the said motion having been overruled by the Court.

At the conclusion of your Plaintiff's evidence, the Defendant-Appellees made a motion for a directed verdict and judgment



in favor of the Defendant-Appellees, which said motion was granted by Judge Williams. The opinion cited from the Bench totally disregarded the testimony of your Plaintiff-Appellant at a state in the proceedings when the case should be decided in a light most favorable to the plaintiff.

Your Plaintiff-Appellant subsequent to the directed verdict granted by the Court filed a motion for a new trial, which said motion was denied. Thereafter, your Plaintiff-Appellant filed a Notice of Appeal to the Court's ruling of April 6, 1984, granting the Defendant-Appellee's motion for a directed verdict and judgment for the defendants. Thereafter, on May 15, 1984, bond hearing was had at which time Judge Williams set an appeal bond of \$2,000,000.00, which your plaintiff



appealed and the said bond was subsequently reduced to \$5,000.00.

This action is from an order of the Honorable Glen M. Williams which was entered along with an opinion from the Bench dated April 6, 1984, in which his Honor granted the Defendant-Appellees' Motion for a directed verdict and judgment in favor of the Defendant-Appellees. This judgment was subsequently affirmed in the U.S. Court of Appeals for the Fourth Circuit dated July 23, 1984.

It is this Order from which the Appellant seeks relief.

1. DID THE DISTRICT COURT HAVE JURISDICTION TO HEAR THIS CASE AFTER ENTERING AN ORDER MAY 19, 1983, ABANDONING THE REAL ESTATE AND PROPERTY WHICH IS THE SUBJECT OF THIS SUIT AND ALLOWING THE CREDITOR TO REALIZE ON ITS INTEREST?

Before this encumbered real estate was abandoned, the trustee in bankruptcy



took title. However, the Court found to continue this business was not feasible.

After proper notice, the trustee in bankruptcy may abandon burdensome property or property of inconsequential value. 11 USCS § 554(a)(b).

On May 19, 1983, this property was, by Court Order, "abandoned from the debtor's estate." The mortgagee (NCNB Financial Services) was allowed "to take possession of all assets abandoned herein and to realize on its security interest in said assets." The Order of May 19, 1983, continued the proceeding only for a "report concerning the sale of the assets," administrative expenses, application of monies paid, outstanding indebtedness secured by assets, etc.

Property which has been abandoned under 11 USCS § 554(c) scheduled and not administered is deemed abandoned to the bankrupt (Coleman) debtor. This rule



apparently resulted from prior law giving the bankrupt the right to assert title to property abandoned by the trustee in bankruptcy.

NCNB Financial Services did take possession. They appointed a substitute under the deed of trust, who was employed by them in litigation with coleman, and thereafter other procedures were followed as required by Virginia state law to foreclose.

In Bushong v. Theard, 37 F.2d 690 (5th Cir. 1930), it was held where property is mortgaged to an amount leaving no equity for a bankrupt estate, the enforcement of the mortgage should be left to the state courts.

The Appellant first brought this action in the Circuit Court of Pulaski County contending that only a state court had proper jurisdiction. However, the



Appellee convinced the state court that proper jurisdiction was federal.

The law is clear that jurisdiction of bankruptcy courts are limited. Objections to the subject matter of jurisdiction cannot be waived nor can there be consent to such jurisdiction. Re Roberts, 460 F. Supp. 88 (N.D. Ga. 1981).

It is submitted that the proper jurisdiction for this action was the Circuit Court of Pulaski County.

At 9 Am. Jur. 2d page 450 § 256 Effect of abandonment or failure to abandon, it is stated:

"Abandonment may be to any party with a possessory interest in the property abandoned. Property which has been abandoned under 11 USCS § 554(c) because scheduled and not administered, it has been said, is deemed abandoned to the debtor. This result apparently follows prior law which gave the bankrupt the right to assert title to property of the state upon abandonment by the trustee. Such reversioning of title may be irrevocable, in light of cases decided under the



1898 Act indicating that the trustee is precluded from reclaiming property of the state which has already been abandoned, moreover, there is authority under the Bankruptcy Act of 1898 to the effect that the abandonment relates back to the date of filing of the petition."

There are cases in which state courts have taken jurisdiction of matters involving a trustee in bankruptcy.

In Irvin, et al v. Harris, et al, 127 S.E. 529, 189 N.C. 465 (1925), a Trustee in Bankruptcy intervened in a state action to recover money which resulted from the sale of real estate. The Trustee in Bankruptcy was unsuccessful since the bankruptcy court, by Order, had abandoned this real estate. In this case, there had been an increase in the real estate which was not foreseeable.

In order for a bankruptcy court to have jurisdiction of abandoned property, jurisdiction must be conferred by law.



For example, the determination of a nondischargeable debt may confer jurisdiction to determine matters involving the title to property.

In the case of Re Roberts, 460 F. Supp. 88 as a prerequisite to determining if a claim is nondischargeable property may be litigated.

In Roberts, the plaintiff brought a complaint to determine the dischargeability of debts pursuant to Rule 409 (Jurisdiction is conferred exclusively in the Bankruptcy Court for such a determination. It may also render judgment therein and decide any remaining issue.) 11 USC § 35(c)(e).

The Bankruptcy Judge set aside a deed between Plaintiff and the Bankrupt on a finding of inadequate delivery and also cancelled a trust deed, and gave the Plaintiff immediate possession of the property. This relief had not been



requested, and the property had been abandoned.

The Court held that a ruling on the title to the real estate and trust deed were a prerequisite to deciding dischargeability of the debt.

The case of Re Green Mountain Meadows, Inc. (1978, F BC D.C. Vt.) 4 BCD 1266, 19 CBC 586 held that a Trustee in Bankruptcy is divested of title to property upon abandonment, such that the bankruptcy court no longer effectively exercised jurisdiction over it.

Upon the point of jurisdiction, the case of Re Polumbo (1967, W.D. Va.) 271 F. Supp. 640 is submitted. This case involved a dispute over payment of real estate tax between the trustee under a deed of trust and the bankrupt's estate. An Order of abandonment had been entered on the encumbered real estate. The



Referee in Bankruptcy allowed the Bankruptcy Trustee to cooperate with the trustee under the deed of trust so that the property (motel) might be sold as a going business.

This case stated that once the Trustee in Bankruptcy abandoned an asset, the trustee is "absolutely precluded from later reclaiming it" even if there has been a later increase in its value.

The court went on to further say (P642):

"Since abandonment has no effect on the validity of the liens encumbering the property (Collier ¶ 70.42 [4]n. 19a) the practical effect of the election is to remove the asset entirely from the jurisdiction of the bankruptcy court."

In the case at bar, there was no reason nor any statutory authority for the bankruptcy court to continue jurisdiction over the real estate in question. It is submitted that the proper forum to



litigate this matter is in the Circuit Court of Pulaski County.

2. DID THE DISTRICT COURT ERR IN RULING THAT THE SUBSTITUTE TRUSTEE UNDER A DEED OF TRUST DID NOT HAVE A CONFLICT WHEN SAID TRUSTEE WAS AN ATTORNEY FOR NOTE HOLDER-CREDITOR, NCNB FINANCIAL SERVICE AND REPRESENTED THEM IN LITIGATION WHICH INVOLVED THE AMOUNT DUE UNDER THE DEED OF TRUST?

Some time before the sale of the real estate Appellee Douthat had been retained and was being paid by Appellee NCNB Financial Services to represent them in pending litigation in the District Court. This litigation involved a dispute over the interest rate in the note that would later be "foreclosed." Under the deed of trust Appellee NCNB Financial Services could appoint and did appoint Appellee Douthat as trustee, who sold the property involved. At the time of the sale and thereafter the litigation was still pending.



The trustee, in the case of a deed of trust, is the agent of both the owners of the property and of the secured debt, and it is his duty in selling the property to act without partiality toward either of them. (55 Am. Jur. 2d § 699, 640; White v. MacQueen, 360 Ill. 236, 195 N.E. 832).

Courts have held that a trustee in exercising power of a sale, should scrupulously avoid placing himself in a position where his interest might conflict with the interest of those he represents. In fact, he will not be allowed to place himself in such a position that he may not perform his duty to the owner of the equity of redemption. (55 Am. Jur. 2d § 699, 640).

It is submitted that there was a conflict on the part of the trustee, under the deed of trust. The following is from 13A Michie's Jurisprudence:



§ 47. Who May Be Trustee. It is held that where the parties agree that their respective counsel may act as trustees, it may be done. But where there is but one trustee, he ought not to be counsel of one of the parties, especially, where he may have to decide questions which may be of vital interest to the adverse party. An Attorney for the creditor is not incompetent to act as trustee in a deed of trust securing a debt; but being then the agent of both parties he is bound, in executing the trust, to act honestly and impartially between the parties, and endeavor by proper notice and otherwise to obtain the best price for the property, and if necessary, to invoke the aid of a court of equity in doing so.

The undisputed facts reveal that Appellee Douthat was representing NCNB Financial Services in a dispute over the interest rate called for in the note. This litigation over the interest rate of the note was in progress at the time Mr. Douthat was appointed as trustee under the deed of trust.



It is submitted that the District Court was in error in ruling that no conflict existed. It is submitted that the trustee has duties to the maker and the noteholder and a conflict arose.

3. DID THE DISTRICT COURT ERR BY HOLDING THAT A VALID SALE WAS CREATED BETWEEN NCNB FINANCIAL SERVICES AND PULASKI FURNITURE CORPORATION DESPITE THEIR LACK OF AGREEMENT AS TO THE DISPOSAL OF THE FIXTURES AT THE JULY 15 AUCTION?

The Appellant contends that no valid contract was created on July 15 because the terms of the auction were too vague for NCNB Financial Services, Pulaski Furniture, and the other bidders at the auction to achieve a "meeting of the minds." In Smith v. Farrell, 199 Va. 121, 98 S.E.2d 3 (1957), the Supreme Court of Virginia, reiterated the hornbook proposition that before a contract may be consummated, the parties must be in substantial



agreement about the material terms of the deal.

It is beyond dispute that Pulaski Furniture Services did not agree as to the disposal of the fixtures connected to the Coleman property. Agents for Pulaski Furniture Corporation testified that they believed that certain fixtures were included in the sale of the land. Agents for NCNB Financial Services testified that they believed they were selling only the "four walls and the land." No meeting of the minds regarding the disposal of the fixtures occurred on July 15.

The sale of the fixtures was a material element in the contract for the sale of the Coleman real estate. According to the statement of Barman, an agent of NCNB Financial Services, NCNB Financial Services was willing to let Pulaski Furniture out of its bid if the two entities could not agree on the disposal of the



fixtures. Since the sale would not proceed without the settlement of this controversy, the term must be considered material.

The Appellant does not deny that a contract for the sale of the Coleman property did eventually arise between Pulaski Furniture and NCNB Financial Services. It is the Appellant's contention that this sale violated the Virginia Code § 55 regulating the conduct of trustees in lien sales.

The lack of an auction at which the buyers were clear as to what was being sold violates Virginia Code § 55-59. The purpose of this section is to ensure that the rights of both parties to the lien will be protected. The grantor of the lien should get the highest possible price for his property; the grantee should be



able to sell the property and protect his investment in the loan.

The rights of Coleman Furniture, the grantor of the lien, were not protected in the present case. The auction did not produce the highest possible price because the bidders could not be sure what they were bidding upon. The mere fact that this sale of an uncertain property was advertised in accordance with the statute should not cause this court to overlook the fact that the interest of the Appellant were compromised. The Trustee sold the property quickly, but that was only half of his duties.

Appellant's rights were not protected by the subsequent creation of a contract between NCNB Financial Services and Pulaski Furniture. The Contract was not created as the result of a public auction but as a result of a private bargaining between the trustee and Pulaski Furniture



Corporation. This private sale by a trustee under a lien violates § 55, which mandates a sale by public auction. The statute does not mandate that the beginning process should commence with a public auction, it mandates that the property should be sold at public auction. The private sale does not meet this standard. The assignment of rights from Pulaski Furniture to NCNB Financial Services and back again should have no bearing on the rights created in Pulaski Furniture from the trustee. Contract rights are derivative: one cannot increase one's rights through their assignment. Hartford Fire Insurance Co. v. Mutual Savings, 193 Va. 269, 68 S.E.2d 541 (1952). If Pulaski Furniture had no rights under the contract of sale, it could assign none.

The Appellant, therefore, requests that the District Court be reversed



because no contract of sale valid under Virginia law exists or has existed between the trustee and Pulaski Furniture.

CONCLUSION

For the reasons stated above, your Plaintiff-Appellant, Shumate, respectfully submits that he is entitled to the relief requested through this brief. Due to the errors committed by the District Court at the trial of this matter on March 5 and 6, 1984, your Plaintiff-Appellant has been grievously injured and his only relief now lies with this Court.

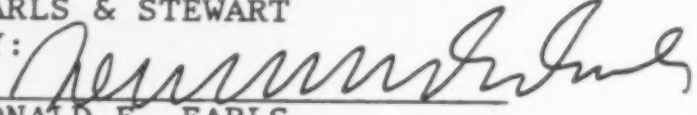
RESPECTFULLY SUBMITTED,
JOSEPH B. SHUMATE, JR.

JENKINS & QUIGLEY

and

EARLS & STEWART

BY:


DONALD E. EARLS



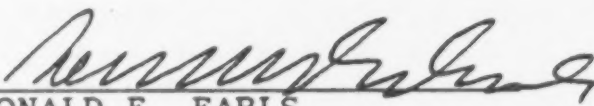
I, Donald E. Earls, do hereby certify
that I have this 1st day of November,
1984, mailed a true copy of the foregoing
Petition for Writ of Certiorari to the
persons listed below.

Benjamin C. Ackerly, Esquire
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Roanoke, Virginia 24004


DONALD E. EARLS



UNITED STATES COURT OF APPEALS
For the Fourth Circuit

No. 84-1519

Joseph B. Shumate, Jr.,

Appellant,

v.

James F. Douthat, NCNB Financial
Services, Inc., and Pulaski
Furniture Corporation,

Appellees.

In Re:

Coleman Furniture Corporation,

Debtor.

Appeal from the United States District
Court for the Western District of
Virginia, at Roanoke. Glen M. Williams,
District Judge. (C/A 83-M-16R)

Argued: June 7, 1984 Decided: July 23, 1984
Before RUSSELL, MURNAGHAN, and ERVIN,
Circuit Judges.

John C. Quigley, Jr., and Max Jenkins
(Jenkins & Quigley on brief) for
Appellant; Benjamin C. Ackerly (T. Justin
Moore, III, and Hunton & Williams on
brief) for Appellee Furniture Corporation;
Thomas A. Leggette (William B. Poff;
Daniel F. Layman and Woods, Rogers, Muse,
Walker & Thornton on brief) for Appellee
James F. Douthat; Stephen M. Hodges (Penn,
Stuart, Eskridge & Jones; George V. Hanna,
III; Hayden J. Silver, III; Moore, Van
Allen & Allen on brief) for Appellee NCNB
Financial Services, Inc.



PER CURIAM:

Joseph B. Shumate, a personal guarantor on a deed of trust, seeks to set aside the foreclosure sale of real property belonging to Coleman Furniture Corporation. The United States District Court for the Western District of Virginia found the sale valid in all respects. We affirm.

I.

On November 3, 1982, Coleman Furniture Corporation filed a Chapter 11 Bankruptcy petition. Three months later the district court appointed a trustee in bankruptcy. The trustee attempted to sell Coleman Furniture as a going concern but was unsuccessful. The trustee then abandoned the property, and on May 19, 1983, the district court entered an order of abandonment pursuant to 11 U.S.C. § 554. This order permitted North Carolina National Bank Financial Services (NCNB-FS)



to take possession of the abandoned assets and to dispose of those assets under its security documents free and clear of all encumbrances and liens.

On June 7, 1983, James Douthat, trustee under the deed of trust between NCNB-FS and Coleman Furniture, notified Coleman Furniture, Shumate, and the trustee in bankruptcy that the real property would be sold at foreclosures. On June 24, 1983, Douthat advised the parties that the equipment and remaining inventory of Coleman would be sold at a separate public auction. Subsequently, Douthat advertised in two area newspapers that the foreclosure sale of real property belonging to Coleman Furniture would be held on July 15, 1983. Before the sale Shumate and Coleman Furniture filed a motion in the district court to enjoin the



sale. The district court denied the requested relief.

On July 15, 1983, Douthat conducted th foreclosure sale on the courthouse steps of the Pulaski Circuit Court with the assistance of the bankruptcy trustee for Coleman Furniture. Before the sale began, Douthat announced that he would be selling only "the four walls and the dirt." A lis of personal property not being sold was available to the public in attendance that if they were unsure whether a particular item was being sold with the realty, they should presume the item to be personal property and not included in the sale. The audience had an opportunity to as questions, but no one raised any questions, protested the sale, or requested that the sale be postponed. Douthat first took bids on the two separate tracts of land and then on the entire tract. Pulaski Furniture



Corporation was the higher bidder at two million dollars.

After the sale a dispute arose between NCNB-FS and Pulaski Furniture regarding whether certain items of personal property that were affixed to the building were sold with the realty. Because of this dispute, NCNB-FS agreed to purchase and Pulaski Furniture agreed to sell its two million dollar bid to NCNB-FS. Approximately three months after Pulaski Furniture had assigned its right of purchase to NCNB-FS, Pulaski Furniture reacquired the right from NCNB-FS for two million dollars, the amount of the original bid. Pulaski Furniture later purchased the personal property covered by a security agreement that was separate from the deed of trust at a private sale for approximately one million dollars.



II.

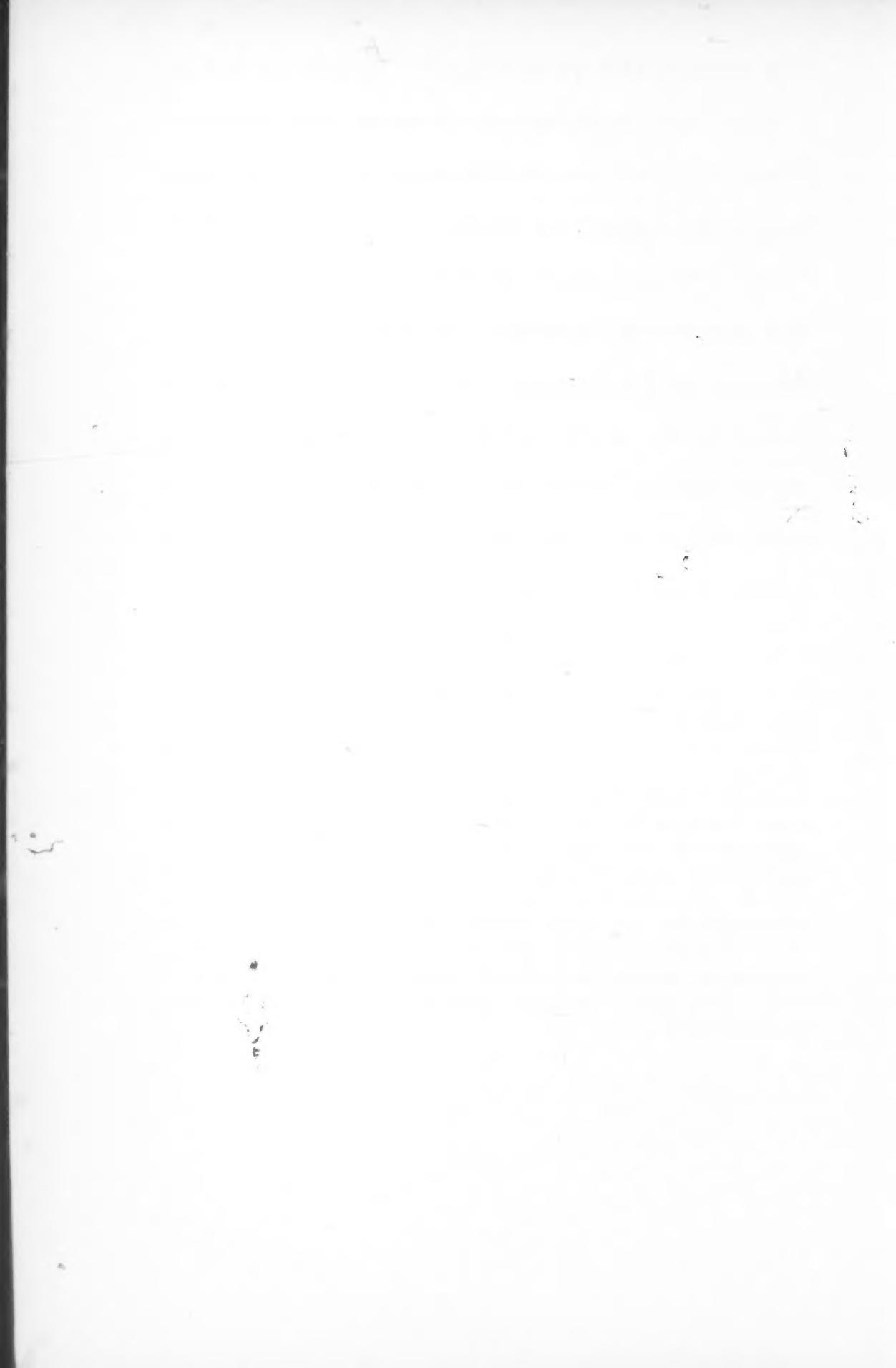
On appeal, Shumate argues that the contract between Pulaski Furniture and NCNB-FS was invalid and that the district court did not have jurisdiction to uphold the foreclosure sale. Shumate also argues that Douthat should not have been permitted to serve as trustee under the deed of trust because his position as attorney for NCNB-FS created a conflict of interest. Finally, Shumate contends that the sale was not conducted pursuant to the terms of the deed of trust and as advertised. We find no merit in any of these assertions.

First, we are not convinced that the district court lacked jurisdiction over



the abandoned property.¹ Under 11 U.S.C. § 554, the bankruptcy trustee may abandon property that is burdensome to the estate. In re Bennett, 13 Bankr. 643 (Bankr. W.D. Mich. 1981). Once property is abandoned, the trustee cannot later reclaim it. Matter of Enriquez, 22 Bankr. 934, 935-36 (Bankr. D. Neb. 1982). The trustee's abandonment, however, does not divest the district court of jurisdiction. Under 28 U.S.C. § 1471(a) and (b) (Supp. 1984), the

¹ On November 9, 1983, this suit was transferred from the Pulaski County Circuit Court to the United States District Court on the joint motion of Shumate and the appellees. After the case was transferred, Shumate amended his complaint twice without objecting to the district court's jurisdiction. In July of 1983 Shumate had filed a separate proceeding in the district court to enjoin the foreclosure sale. In that action, Shumate alleged that the district court had jurisdiction over the abandoned property.



United States District Courts have original jurisdiction over all bankruptcy cases brought under title 11 and "all civil proceedings arising under title 11 or arising in or related to cases under title 11."² In re Kaiser, 722 F.2d 1574, 1578 (2d Cir. 1983). Accord In re

² 28 U.S.C. § 1471(a) and (b) state:

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11. (footnote omitted).

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11 or arising in or related to cases under title 11.



Guaranty Chevrolet, 35 Bankr. 381 (S.D. Cal. 1983); In re Color Craft Press, Ltd., 27 Bankr. 962 (D. Utah 1983). Because the foreclosure sale of the abandoned property in this case was related to the bankruptcy proceedings, we conclude that the district court properly exercised its jurisdiction pursuant to 28 U.S.C. § 1471(a) and (b).

Second, Shumate was not a party to the contract between NCNB-FS and Pulaski Furniture or an intended beneficiary but rather an incidental beneficiary. See Richmond Shopping Center, Inc. v. Wiley N. Jackson Co., 220 Va. 135, 142, 255 S.E.2d 518, 523 (1979). He has no standing, therefore, to attack the validity of the contract.

Shumate's third contention that Douthat had a conflict of interest is also unpersuasive. The creditor's attorney may



serve as trustee under a deed of trust.³
Terry v. Fitzgerald, 73 Va. (32 Gratt.)
843 (1879). The district court found no
improprieties in Douthat's conduct as
trustee. We conclude that the district
court was not clearly erroneous in finding
that Douthat properly fulfilled his duties
as trustee. See Fed. R. Civ. P. 52(a).

³ In this case Douthat and Thomas T. Palm were appointed substitute trustees pursuant to the terms of the deed of trust. Shumate was aware of Douthat's appointment and could have objected prior to the foreclosure sale. Shumate, however, did not object until after the sale. The district court correctly concluded that Douthat was not automatically disqualified as trustee under Virginia law. See In re Taddeo, 685 F.2d 24 (2d Cir. 1982) (the effect of liens is determined by state law except when a federally enacted policy would be frustrated); In re Wallace, 31 Bankr. 64 (Bankr. D. Md. 1983) (state law governs the operation and validity of deeds of trust).



Finally, we find no merit in Shumate's assertion that Douthat failed to comply with the terms of the deed of trust or the advertisement of the sale. At the beginning of the auction Douthat announced that he was selling only "the four walls and the dirt." Douthat invited questions, but no one raised any questions, protested the sale, or requested that the sale be postponed. Indeed, before bidding begins, the auctioneer may orally modify the advertised terms of the sale, and these modifications are binding upon the bidders. Holston v. Pennington, 225 Va. 551, 556, 304 S.E.2d 287, 290 (1983). Accordingly, we are not persuaded that the district court was clearly erroneous in finding that the sale was conducted properly. See Fed. R. Civ. P. 52(a).



III.

For the foregoing reasons the judgment of the district court is

AFFIRMED.⁴

⁴ In light of our disposition of this case, Pulaski Furniture Corporation's motion for leave to file transcript on June 20, 1984, is denied.